No. 580

IN THE

Supreme Court

OF THE

UNITED STATES

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, Deceased,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY OPPOSING PETITION FOR CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

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STATEMENT.

The statement of the case as set forth in the opinion of the Circuit Court of Appeals for the Ninth Circuit is sufficient.

129 Fed. (2nd) 1013 (R., pages 268 to 274.)

ARGUMENT.

This cause of action arose on February 16, 1939, prior to the August 11, 1939, amendment to the Federal Employers' Liability Act. There is no dispute as between the parties but that the action is governed by the provisions of the law as they existed prior to the

amendment. (See Summary Statement in Petition for Writ of Certiorari, page 6.) Under these provisions assumption of risk is a complete defense, except in cases involving violation of some Federal Safety statute.

45 *U. S. C. A.*, Sec. 54; 35 Stat. 66, Sec. 4.

While other grounds were presented by respondent before the Circuit Court of Appeals to support its judgment, the decision was based on the single ground that petitioner's decedent assumed the risk as a matter of law. (R., page 274.)

Much of the petition and of the brief in support of the petition for writ of certiorari is devoted to a discussion of various alleged grounds of negligence on the part of the respondent. (See pages 2, 3, 4, 8, 12, 17, 24 and 28.) These claimed grounds of negligence, including the alleged failure to keep a look-out, to give a warning, to provide a safe place to work, to receive a hand signal, were eliminated by the trial judge prior to submission of the case to the jury. These matters were not before the Circuit Court of Appeals for consideration. (R., 168 to 169.) The only issues submitted to the jury were the question of respondent's failure to ring the engine bell, the question of proximate cause and the question of petitioner's assumption of risk. The Circuit Court of Appeals, on the basis of the undisputed testimony that over a period of more than twenty years it had been the custom of the company's employees, including the decedent, not to ring or re-

quire the ringing of any bell in ordinary switching movements, held as a matter of law that decedent assumed the risk.

The only claim of petitioner that there is a conflict in the testimony on this particular issue of assumption of risk is made on page 9 of the petition, and on page 17 of the brief referring to the testimony of petitioner's witness Hinkle. Reference to the two or three questions and answers preceding the testimony referred to indicates that this witness was discussing not the matter of ringing the bell by the engineer, but rather the hand or lamp signals given by switchmen in stopping and starting the cars.

"Q. You have no signals, that is, there are no signals you go by, hand or lamp signals, except those detailed in your book of rules?

A. Yes, we have signals we use in yard work—it does not show in the book of rules for instance, track signs—there is no track signs given in the book of rules I ever noticed. That is a made-up rule that has been followed from one generation to the other.

Q. That is like the sign you got to flag the crossing?

A. Yes.

Q. But for stopping and starting of cars, you go by the signals detailed in the books of rules—is that right?

A. Yes." (R., pages 113 to 114.)

1.

The Supreme Court will not ordinarily grant certiorari simply to review evidence or to discuss specific facts.

U. S. v. Johnston, 268 U. S. 220 at 227; 69 L. Ed. 925, at 926.

2.

The question of a conflict with decisions of other Circuit Courts of Appeal or with applicable decisions of the Supreme Court has become academic.

Without conceding that there is any conflict either with decisions of other circuits or with applicable decisions of the Supreme Court, it should be pointed out that an amendment to the Federal Employers' Liability Act of August, 1939, eliminating the defense of assumption of risk, renders the question of possible conflicts under the former statute academic. The Supreme Court need not consider academic questions.

See *Ford Motor Co. v. N. L. R. B.,* 305 U. S. 364, at 375; 83 L. Ed. 221, 230.

It seems clear that in view of the 1939 amendment to the Federal Employers' Liability Act any decision now rendered on the law of assumed risk as it existed prior to that amendment would not settle any question of present general interest. Nor would it be likely to serve the purpose of eliminating conflicts in the decisions of the Circuit Courts of Appeal as to the former law. The statute as amended itself serves the purpose of creating a new uniformity.

45 *U. S. C. A. Supp.,* Sec. 54; 53 Stat. 1404, Sec. 1.

3.

There is, in any event, no conflict as between the decision of the Circuit Court of Appeals for the Ninth Circuit in the present case and any decisions of this Court, or of Circuit Courts of Appeals on the law of assumed risk as it existed prior to the amendment.

This is a matter wherein each case depends peculiarly upon its own facts. The present case differs from any case cited by petitioners in that petitioner's decedent himself was the foreman in charge of the switching operaiton and decedent himself gave the verbal instruction for the switching movement which resulted in his death. As stated by the trial judge in passing on one of the other alleged grounds of negligence at the trial:

> "I don't think under the testimony there was any necessity for further hand signals. The decedent Owens had orally instructed the field switchman to kick back those two cars and had the right to apprehend they would be kicked back." (R., page 169.)

Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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